

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

76-2172

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

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UNITED STATES OF AMERICA,
EFRAIN SANTIAGO,

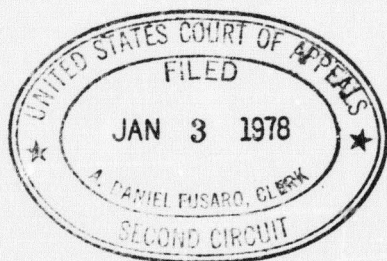
Petitioner-Appellee,

-against-

LEON VINCENT, Superintendent of Green
Haven Correctional Facility,

Respondent-Appellant.
-----X

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING
EN BANC



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Statement

The petition seeks rehearing of a judgment of this Court dated December 18, 1977 which affirmed the granting of a petition for a writ of habeas corpus by the United States District Court for the Southern District of New York dated September 12, 1977 (Gagliardi, D.J.)

The reason for this petition is to have the Court consider the impact of Wainwright v. Sykes, 45 U.S.L.W. 4807 (U.S. June 23, 1977), which was not cited by the appellant upon the appeal because of its recency.

ARGUMENT

PETITIONER FAILED TO ESTABLISH
CAUSE FOR NONCOMPLIANCE WITH THE
NEW YORK RULE OF EVIDENCE THAT
REQUIRES AN EXPLANATION FOR AN
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WAINWRIGHT v. SYKES, 45 USLW 4807
(U.S. June 23, 1977), HABEAS
CORPUS DOES NOT LIE.

It is the argument of the Attorney General that the Wainwright case applies here and because of its binding effect requires reversal. Petitioner, at bar, argued that he was denied his right to confrontation because the trial court sustained an objection to a question asked of a prosecution witness, Mildred Crespo - whether she had learned that her brother had been taken to the stationhouse about a homicide she had witnessed prior to speaking to the police about the incident. Petitioner argued that this question was designed to elicit information from the witness from which the defense could argue that she had a motive to lie and falsely identify the petitioner as the murderer in order to throw suspicion away from her brother.

However, as the trial record makes clear, the lynch-pin of petitioner's defense in the trial court was that the three witnesses who identified him as the murderer were mistaken, and this bias argument, urged for the first time by a new counsel in the Appellate Division, was never the reason for the question put to Mildred Crespo by defense counsel. Rather defense counsel was simply trying to show that another individual had been

questioned about the homicide notwithstanding prior descriptions of the petitioner given to the police officers to support the defense theory that the identification of petitioner was weak.

Most importantly petitioner's failure to explain the basis for the objected to question in the trial court as well as his utter failure in the District Court to justify the omission of such an explanation is fatal to his habeas corpus claim under the principle of Wainwright v. Sykes, 45 U.S.L.W. 4807 (U.S. June 23, 1977). New York law required petitioner's question to Mildred Crespo, having been objected to, to be explained:

"A ruling which sustains an objection to the offer of a seemingly irrelevant or immaterial proposition cannot be made the ground for appellate review absent a statement of the purpose of the offer by the proponent."
Fisch on New York Evidence, 2d Ed.
§ 16 (1977).

In the context of petitioner's trial on a misidentification theory, the inquiry as to whether Mildred Crespo had learned that her brother had been at the stationhouse was clearly irrelevant. Without some explanation as to the purpose of the question, the trial court reasonably sustained an objection to the question since it did not relate to the ability of the witness to identify the petitioner and called for an answer based on hearsay.

Wainwright v. Sykes, supra, makes clear that before habeas corpus relief may be granted an applicant must explain his failure to comply with a state procedural requirement. The justification for the new waiver test spelled out in Wainwright is to make "the state trial on the merits the 'main event', so to speak, rather than a tryout for what will later be the determinative federal habeas hearing". Surely, this is what has occurred here with every prosecution witnesses having had to testify over again in the District Court. By explaining the purpose of the question as required by New York Law, the petitioner could have made his trial not merely the main event but indeed the only event, thereby obviating the need for a federal habeas corpus hearing at all.

Of course petitioner was the only suspect in the homicide as trial counsel well knew. Accordingly, when his questions to Mildred Crespo were objected to, he made no claim they were designed to show bias or motive to lie on her part. Defense counsel had interviewed Mildred Crespo well in advance of the trial. He had spoken to Mildred Crespo's brother and been apprised of his discussion with Detective Hughes. He had made assessments of their credibility and a theory of bias was simply not part of his defense strategy. Given the basis on which the trial proceeded, the trial judge had no reason to permit the line of questioning that is ~~now~~ urged as proper in this writ, and it was a proper exercise of the trial court's discretion to sustain objections to the unexplained inquiry.

In granting the writ, the most Judge Gagliardi was able to find was that there would have been a good faith basis for pursuing a bias theory. But this is irrelevant to the issue at hand since such a theory was not pursued by defense counsel. Since defense counsel reasonably concluded that petitioner's best defense was a theory of mistaken identification, petitioner has, of course, been unable and has never explained the lack of an explanation on a bias theory for the objected to question put to Mildred Crespo. Under these circumstances the Wainwright principle controls.

CONCLUSION

THE PETITION FOR REHEARING SHOULD
BE GRANTED AND UPON REHEARING, THE
JUDGMENT BELOW SHOULD BE REVERSED.

Dated: New York, New York
January 3, 1977

Respectfully submitted,

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